Supreme Court, U.S.
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No. 99-1918

In the Supreme Court of the United States

MICHAEL MASSEY, ET AL., PETITIONERS

v.

DAVID HELMAN, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the suit brought by petitioner Massey, a prisoner confined in a federal correctional institution, was properly dismissed for failure to exhaust administrative remedies as required by the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a) (Supp. III 1997).

2. Whether petitioner Otten has standing to assert the constitutional rights of petitioner Massey and the other federal prisoners whom he treated while a staff physician at a federal correctional facility.

3. Whether the Civil Service Reform Act, 5 U.S.C. 2301 *et seq.*, is petitioner Otten's exclusive remedy for challenging the termination of his federal employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 196 F.3d 727. The opinion of the district court (Pet. App. 32-50) is reported at 35 F. Supp. 2d 1110.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1999. A petition for rehearing was denied on March 1, 2000 (Pet. App. 51). The petition for a writ of certiorari was filed on May 30, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Michael Massey is an inmate at the Federal Correctional Institute at Pekin, Illinois (FCI-Pekin). While confined at FCI-Pekin, Massey was examined on August 5, 1996, by petitioner John Otten, M.D., who was then serving as a staff physician at FCI-Pekin. Doctor Otten determined that Massey should undergo surgery at a local hospital to repair an abdominal hernia. Although Dr. Otten communicated his recommendation to the Health Services Administrator, respondent Ferdinand Somalia, the surgery was not approved. Massey therefore filed this action, pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against respondent Somalia as well as respondents David Helman (the Warden of FCI-Pekin), Miguel Gonzalez (the Assistant Warden), and Kenneth Morit Sugu (Medical Director of the Bureau of Prisons (BOP)). Pet. App. 5-6.

Massey alleged that FCI-Pekin and BOP administer policies that are deliberately indifferent to prisoners' medical needs in violation of the Eighth Amendment. Specifically, he alleged that (1) BOP's medical care policy effectively prohibited the surgical repair of routine hernias, (2) BOP restricted the authority to approve this surgical procedure to its Medical Director, and (3) BOP deprived prison physicians of control over the medical treatment for prisoners under their care. Pet. App. 6.

During pretrial discovery, Assistant Warden Gonzalez suspended Dr. Otten in connection with allegations that he had administered inadequate medical care to prisoners. Eventually, Gonzalez recommended that Dr. Otten be discharged, and Warden Helman approved

the discharge effective February 26, 1998. Pet. App. 6-7. Shortly thereafter, Dr. Otten joined Massey's lawsuit. Doctor Otten alleged that respondents had terminated his employment to retaliate against him for speaking out on medical care in the prison and that his discharge violated his First Amendment rights. He also claimed that prison officials violated the Eighth Amendment right of prisoners to receive medically necessary treatment, and that his discharge violated the prisoners' First Amendment right of access to the courts to vindicate their Eighth Amendment rights. *Id.* at 7.

2. Respondents moved to dismiss the complaint. They argued that Massey's claim was barred because he had failed to exhaust his administrative remedies, as required by the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(a) (Supp. III 1997); that Dr. Otten's claim for retaliatory discharge was barred because the Civil Service Reform Act (CSRA), 5 U.S.C. 2301 *et seq.*, provided the exclusive remedy for any constitutional violation arising from the termination of his federal employment; and that Dr. Otten lacked standing to assert claims on behalf of prisoners. Agreeing with respondents, the district court granted the motion to dismiss. Pet. App. 32-50.

3. The court of appeals affirmed. Pet. App. 1-31. The court of appeals first held that Massey's claims were properly dismissed for failure to exhaust the administrative remedies provided by BOP. The PLRA, the court of appeals explained, requires exhaustion of "such administrative remedies as are available." *Id.* at 10 (quoting 42 U.S. 1997e(a) (Supp. III 1997)). The court of appeals, like the district court, held that Massey was not excused from the exhaustion requirement by the fact that administrative remedies could not

provide complete relief, such as an award of money damages. *Id.* at 10-11. Instead, relying on its decision in *Perez* v. *Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir. 1999), the court of appeals held that the text of the PLRA requires prisoners to use such remedies as are "available." Accordingly, the court concluded that, "if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim." Pet. App. 11.[1]

Turning to Dr. Otten's claims, the court of appeals concluded that Dr. Otten did not have a *Bivens* remedy for his claim of retaliatory discharge, because the CSRA provided the exclusive remedy for challenging the personnel action taken against him. Pet. App. 19-20. Seventh Circuit cases interpreting *Bush* v. *Lucas*, 462 U.S. 367 (1983), the court of appeals held, "make it abundantly clear that Dr. Otten has no Bivens remedy in federal court for the claimed retaliation." Pet. App. 19. The court continued:

> For example, in *Robbins* v. *Bentsen*, 41 F.3d 1195, 1202 (7th Cir. 1994), we held that an employee of the Internal Revenue Service could not maintain a First Amendment retaliation claim because we were "clearly presented with a situation in which Congress has provided an elaborate remedial scheme, the CSRA, for the protection of . . . constitutional rights in the employment context."

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[1] The court of appeals also rejected Massey's claim that the government had waived its defense of failure to exhaust. Pet. App. 14-17.

Ibid. Here, the court of appeals explained, Dr. Otten was a former federal employee who could have used the CSRA to challenge the alleged retaliatory discharge as a violation of his First Amendment rights. *Id.* at 20.[2]

The court of appeals also affirmed dismissal of Dr. Otten's remaining claims for lack of standing. Doctor Otten claimed that his discharge, which occurred just before he was deposed in Massey's lawsuit, had deprived the prisoners of their First Amendment right to unimpeded access to the courts, and that the medical treatment administered to prisoners violates the Eighth Amendment. Pet. App. 24-25. Because Dr. Otten sought to assert the constitutional rights of others, the court of appeals explained, it was appropriate to ask (1) whether Dr. Otten had suffered "some injury in fact sufficient to create a case or controversy" and (2) whether "as a prudential matter," Dr. Otten was "the proper proponent of the particular legal rights he is asserting." *Id.* at 26 (citing *Caplin & Drysdale, Chartered* v. *United States*, 491, U.S. 617, 624 n.3 (1989), and *Singleton* v. *Wulff*, 428 U.S. 106, 112 (1976)).

The court of appeals concluded that Dr. Otten had failed to meet the first of those requirements, because he lacked "a personal stake in the outcome of the prisoners' case." Pet. App. 26. The court rejected Dr. Otten's contention that his discharge interfered with the inmates' ability to gather evidence, because Dr. Otten had testified at his deposition notwithstanding that discharge. *Id.* at 26-27. Nor did Dr. Otten have a

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[2] The court of appeals also explained that, although the district court purported to dismiss for lack of subject matter jurisdiction, the dismissal of the First Amendment claim should have been for failure to state a claim on which relief could be granted. See Pet. App. 20-24.

sufficient stake in the outcome to object to the medical treatment received by prisoners, the court of appeals concluded. *Id.* at 27. Because Dr. Otten is not a prisoner, the court explained, he has no Eighth Amendment interest in the medical treatment of prisoners. *Ibid.* Furthermore, the court continued, Dr. Otten's status as a physician did not give him an automatic right to assert the prisoners' rights for them. Unlike the physician-plaintiff in *Singleton* v. *Wulff*, 428 U.S. 106 (1976), who had a pecuniary interest in providing the abortion services sought by his patients, Dr. Otten has no pecuniary interest in the medical treatment of prisoners and "stands to gain nothing by advocating the third party rights of inmates." Pet. App. 28.

The court of appeals also concluded that, because Dr. Otten failed to meet the second requirement—that he be "a proper individual to represent the prisoners' interests"—he lacks standing in light of prudential considerations. Pet. App. 28. Although Dr. Otten claims a special relationship with the prisoners on account of his status as a physician, the court explained, Dr. Otten (because he was discharged) no longer has a physician-patient relationship of any variety with the prisoners. *Id.* at 30. In addition, the court observed, the medical treatments at issue in *Singleton*—abortion services—were time-sensitive and required intimate counseling from the physician. *Ibid.* (citing 428 U.S. at 117). Here, the services at issue are not time sensitive, and do not require extensive counseling. *Id.* at 30-31. Finally, the court pointed out that, in *Singleton*, privacy considerations and imminent mootness prevented women seeking abortions from litigating on their own behalf. *Id.* at 31. In this case, in contrast, the inmates are fully capable of asserting their own rights. *Ibid.*

ARGUMENT

1. In the PLRA, Congress required exhaustion of available remedies by prisoners challenging prison conditions under federal law. In pertinent part, 42 U.S.C. 1997e(a) (Supp. III 1997) provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Notwithstanding that language, Massey claims that he should have been permitted to bring his suit without exhausting administrative remedies. The courts of appeals, he further claims, are in conflict regarding whether or not a prisoner seeking damages only—relief that is not available through Bureau of Prisons administrative processes—must exhaust administrative remedies before filing suit. Pet. 15-20.

As Massey notes (Pet. 16-17), some circuits have held that, in every instance in which a prisoner confined in a federal prison challenges the conditions of his confinement under federal law, the PLRA requires exhaustion of BOP's Administrative Remedy Program. See *Nyhuis* v. *Reno*, 204 F.3d 65 (3d Cir. 2000); *Wyatt* v. *Leonard*, 193 F.3d 876 (6th Cir. 1999); *Alexander* v. *Hawk*, 159 F.3d 1321 (11th Cir. 1998). The Seventh Circuit has adopted a similar construction of the PLRA, but has reserved judgment on whether exhaustion is required where non-monetary relief is no longer possible at the time the action is filed. See *Perez* v. *Wisconsin Dep't of Corrections*, 182 F.3d 532, 536-537 (7th Cir. 1999). In contrast, three courts of appeals have concluded that, under current BOP regulations, if a

prisoner seeks damages only, he has no "available remedy" that must be exhausted. See *Garrett* v. *Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997); *Whitley* v. *Hunt*, 158 F.3d 882, 886-887 (5th Cir. 1998); *Lundsford* v. *Jumao-As*, 155 F.3d 1178 (9th Cir. 1998).

Nothwithstanding that conflict, further review is not appropriate at this time. Under the BOP regulations in effect when Massey brought this action, a federal prison generally would not consider a prisoner grievance that sought only money damages; to the contrary, the prison was instructed that it could reject such a claim as improper subject matter for administrative review. See BOP Program Statement 1330.13, ¶ 6(b)(2). See also 28 C.F.R. 542.12(b). For that reason some courts of appeals have concluded that exhaustion is not required for monetary claims. No administrative remedy is "available" within the meaning of the PLRA, those courts reason, if BOP's own regulations render its administrative procedures inapplicable to, and unavailable for, the prisoner's complaint. See, *e.g.*, *Garrett*, 127 F.3d at 1266 ("The government concedes that if an inmate seeks purely monetary damages * * * the institution staff will reject the claim as constituting improper subject matter for administrative review."); *Whitley*, 158 F.3d at 887 ("Had [plaintiff] submitted a grievance seeking exclusively monetary relief, it is likely that the grievance would have been returned as improper subject matter for administrative review."). Indeed, Massey makes that very argument himself. Pet. 18 ("[T]he Bureau of Prisons itself has adopted a policy statement precluding consideration of prisoner's claims for money damages under the grievance procedure of 28 C.F. R. § 542.10.").

BOP, however, recently proposed new regulations that require its officials to consider the substance of

grievances even if the specific form of relief requested by the prisoner—including money damages—cannot be granted in the administrative proceeding. See Administrative Remedy Program: Excluded Matters, 65 Fed. Reg. 39,768 (2000) (to be codified at 28 C.F.R. Pt. 542). The proposed regulations thus would eliminate the rationale underlying decisions that excuse exhaustion for monetary claims: Simply put, they would make administrative review "available" even where the specific form of relief sought by the prisoner cannot be granted. Because the dispute in this case turns on the effect of regulations that are currently being revised—and adoption of the new regulations is likely to eliminate the existing division in circuit authority—this case does not present a controversy of continuing importance. Accordingly, further review is not currently warranted.[3]

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[3] It also is not clear that this case is an appropriate vehicle for addressing this issue. Although the courts of appeals are divided on whether a federal prisoner must exhaust BOP's Administrative Remedy Program before bringing an action for money damages alone, Massey's initial complaint sought *both* injunctive relief and damages. See Pet. App. 6 ("Massey * * * sought money damages and injunctive relief."). Where a complaint seeks both forms of relief, the courts agree that exhaustion is required for at least the non-monetary claims. See *Alexander* v. *Hawk*, 159 F.3d 1321 (11th Cir. 1998); *Perez*, 182 F.3d 536-537; *White* v. *McGinnis*, 131 F.3d 593 (6th Cir. 1997); see also *Miller* v. *Menghini*, 213 F.3d 1244 (10th Cir. 2000) (holding that the non-monetary claim, but not the damages claim, should be dismissed for failure to exhaust). The value of requiring exhaustion for complaints seeking both monetary and non-monetary relief, moreover, is unquestionable, even under BOP's current regulations. The administrative process not only permits the establishment of a record that may be helpful to the courts, but also affords the prisoner an opportunity for prompt non-monetary relief. Here, for example, Massey obtained his surgery while the lawsuit was pending; it is thus possible that he

Alternatively, Massey contends (Pet. 17-18) that the decision of the court of appeals is inconsistent with this Court's decision in *McCarthy* v. *Madigan*, 503 U.S. 140 (1992). That assertion is incorrect. In *McCarthy*, this Court held that prisoners are not required to exhaust administrative remedies before filing *Bivens* actions. But *McCarthy* was decided before Congress enacted the PLRA and the current exhaustion requirement into law, and *McCarthy* specifically holds that Congress can impose an exhaustion requirement by statute. *Id.* at 156. Moreover, to the extent *McCarthy* bears on the proper interpretation of BOP's regulations, further review would be premature at this time given the existence of proposed changes to the relevant BOP rules.

2. Petitioner John Otten, M.D., challenges the court of appeals' conclusion that he lacks standing to assert the Eighth and First Amendment rights of federal prisoners. Pet. 21-28. Under this Court's decisions, petitioner cannot assert a third party's rights unless he demonstrates both that he has a sufficient personal stake in the outcome and that he is a proper party to represent the other party's interests. *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 623 n.3 (1989). Doctor Otten does not dispute those principles, but claims that he satisfies the relevant requirements. Pet. 21-25.

The court of appeals properly rejected that contention. As the court of appeals correctly concluded, Dr. Otten lacks the personal stake in the outcome that is a prerequisite to standing. Doctor Otten, the court

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could have obtained that surgery without this lawsuit, by filing a grievance instead. See also *Alexander*, 159 F.3d at 1327 (identifying additional advantages of exhaustion).

observed, failed to allege "that his own constitutional rights or other interests correlated to or were affected by the prisoners' First and Eighth Amendment rights he sought to assert." Pet. App. 26. Moreover, as the court of appeals also explained, *id.* at 28-31, Dr. Otten is not a proper party to assert the prisoners' rights. He lacks an ongoing relationship with the prisoners. *Id.* at 29-30. And there is no reason the prisoners' cannot assert their rights themselves. *Id.* at 31. Those facts are fatal to Dr. Otten's claim to third-party standing, even under the criteria he proposes. See Pet. 21 (conceding that, under this Court's cases, third-party standing is inappropriate unless there is "some practical obstacle to the third person's ability to assert [his own] rights.")

Contrary to Dr. Otten's assertion (Pet. 27), the court of appeals' conclusion that he cannot assert the prisoners' Eighth Amendment claims does not conflict with *Singleton* v. *Wulff*, 428 U.S. 106 (1976). *Singleton* recognized the right of physicians to challenge the constitutionality of a state statute proscribing the performance of abortions. In that case, however, the doctors themselves sustained a concrete injury in the form of lost income from performing the procedures that the statute proscribed. *Id.* at 113 (plurality opinion). Doctor Otten has not shown such a direct financial interest in the outcome of the prisoners' Eighth Amendment claims. Pet. App. 28.[4]

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[4] Doctor Otten asserts (Pet. 22-23) that his *discharge* gives him the requisite concrete injury and thus an interest in the prisoners' claims. But Dr. Otten's discharge did not result from a violation of the prisoners' Eighth Amendment rights; nor would it be redressed by a court decision holding the medical treatment at the facility unconstitutional. Instead, the discharge is alleged to have been a violation of the prisoners' and Dr. Otten's First Amendment

Nor does *Singleton* suggest that Dr. Otten is an appropriate plaintiff to pursue the prisoners' Eighth Amendment claims. In *Singleton*, the Court concluded that physician standing was appropriate because various obstacles—including privacy issues and the threat of imminent mootness—might prevent the patients from asserting their own abortion rights directly; and the Court found it significant that the physician is intimately involved in the reproductive decisions implicated by those rights. See 428 U.S. at 117. No comparable considerations are present here. There is no reason the prisoners cannot raise their Eighth Amendment claims themselves, and Dr. Otten no longer has any professional relationship with the prisoners at all, much less a confidential one. Pet. App. 29-31.

For the same reasons, there is no merit to Dr. Otten's claim of conflict (Pet. 22-23) with *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), which permitted physicians to challenge a state statute proscribing the use and distribution of contraceptive devices, or with *Doe* v. *Bolton*, 410 U.S. 179 (1973), which permitted physicians to assert the patient's right to an abortion. In *Griswold* and *Bolton*, the physicians were subject to potential or actual criminal prosecution for violating the statutes; because the statutes applied to the physicians directly and threatened them with criminal sanctions, the Court concluded that the physicians had the requisite personal interest. *Bolton*, 410 U.S. at 188-189; *Griswold*,

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rights. Doctor Otten, however, cannot assert his own First Amendment rights, because the CSRA provides the exclusive remedy. See pp. 15-16, *infra*. Nor can he assert the prisoners', because (1) there is no basis for claiming that they suffered a First Amendment injury, (2) Dr. Otten lacks the requisite relationship with the prisoners, and (3) the prisoners can raise their claims themselves. See pp. 13-15 & n.7, *infra*.

381 U.S. at 481. The Court, moreover, relied on the confidential nature of the physician-patient counseling that takes place in connection with reproductive decisions. 410 U.S. at 189; 381 U.S. at 481. Doctor Otten alleges neither such a personal stake (avoiding criminal prosecution) nor a similar relationship (confidential counseling on reproductive issues) here.[5]

Doctor Otten also challenges (Pet. 25-28) the court of appeals' conclusion that he cannot raise the prisoners' First Amendment claims. That holding, he contends, conflicts with *Board of County Commissioners* v. *Umbehr*, 518 U.S. 668 (1996); *Thaddeus-X* v. *Blatter*, 175 F.3d 378 (6th Cir. 1999); *Hines* v. *Gomez*, 108 F.3d 265, 269 (9th Cir. 1997), cert. denied, 524 U.S. 936

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[5] Nor is the decision below inconsistent with this Court's decisions involving the standing of attorneys to assert the rights of their clients. See Pet. 23-24. In *Caplin & Drysdale*, 491 U.S. at 623 n.3, the Court found that the attorneys had standing to assert their clients' rights in part because the attorneys had a direct financial stake—their $170,000 fee—in the application of the challenged statute. And in *United States Department of Labor* v. *Triplett*, 494 U.S. 715, 720-721 (1990), which involved a disciplinary proceeding against an attorney, the Court held that the attorney had standing to challenge the statute he was charged with violating because it affected his fee and his ability to establish a particular form of legally protected relationship. *Ibid.* The same is true of *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U.S. 1, 8 (1964), where the state law limited the attorney's ability to convey—as well as the client's ability to learn—truthful information through a legally protected relationship. *Id.* at 7-8. Here, in contrast, Dr. Otten has not shown a direct financial interest in the resolution of the prisoners' rights; nor has he shown that resolution of those claims affects his ability to establish or convey information through a particular type of legally protected relationship.

(1998); and *Dixon* v. *Brown*, 38 F.3d 379 (8th Cir. 1994).[6] The claim of conflict is without merit. The cases cited by Dr. Otten do hold (or assume) that governmental retaliation against an individual for engaging in protected expression, or for participating in litigation, may violate the First Amendment. But none of those cases addresses the circumstances in which one individual may assert another's First Amendment rights. To the contrary, in each of those cases the plaintiff—who was allegedly the victim of retaliation for exercising his First Amendment rights—sought to assert his own rights.[7] Moreover, third-party standing is no more appropriate for these claims than for the Eighth Amendment claims addressed above (pp. 10-13, *supra*), since

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[6] Doctor Otten also asserts that the decision conflicts with another Seventh Circuit decision, *Bart* v. *Telford*, 677 F.2d 622 (1982). This Court does not sit to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957) (per curiam). In any event, *Telford* is irrelevant, as it did not involve third-party standing.

[7] Doctor Otten claims (Pet. 25, 28) that he suffered the requisite personal injury because he was discharged. As the cases Dr. Otten cites (*Umbehr*, *Thaddeus-X*, *Dixon*, and *Hines*) all demonstrate, the fact that Dr. Otten was allegedly subjected to retaliation means that he has standing to assert a violation of his *own* First Amendment rights. But, before he can assert the prisoners' First Amendment rights, he must show that the prisoners suffered a First Amendment injury. Here, the prisoners suffered none. Doctor Otten's theory is that his discharge, because it was aimed at preventing him from testifying, deprived the prisoners of their right of full access to the courts. As the court of appeals explained, however, Dr. Otten did testify at his deposition, despite his suspension, and the prisoners lost nothing. Pet. App. 27. Because the prisoners have suffered no First Amendment injury, they have no First Amendment claim. Surely Dr. Otten cannot assert a First Amendment claim for prisoners who have no such claim themselves.

the prisoners are fully capable of asserting their own First Amendment rights, and Dr. Otten has no ongoing special relationship with them.[8]

3. Asserting his own First Amendment rights, Dr. Otten also claims that the CSRA should not be the exclusive means by which he may challenge the constitutionality of the personnel action taken against him. Doctor Otten, however, does not dispute that, under *Bush* v. *Lucas*, 462 U.S. 367 (1983), federal employees are generally remitted to the remedies provided by the CSRA. Instead, he asserts that there should be an exception here because the CSRA does not provide an avenue for him to raise the prisoners' First and Eighth Amendment rights. The exception should extend to his claims, he argues, in order to permit the resolution of all related issues—his claims and the prisoners'—in a single proceeding. Pet. 29-30.

That argument rests on a flawed premise, in view of the court of appeals' correct conclusion that Dr. Otten lacks standing to assert the First and Eighth Amendment rights of the prisoners. But even if Dr. Otten had standing to raise the prisoners' rights, that fact would not excuse him from raising his own claims through the procedures established by the CSRA, the specific and exclusive mechanism Congress established for resolv-

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[8] In addition, even if Dr. Otten had third-party standing to pursue the prisoners' claims for them, those claims would arguably be subject to the administrative exhaustion requirement of 42 U.S.C. 1997e(a) (Supp. III 1997). Although Section 1997e(a) refers to suits "by a prisoner confined in any jail, prison, or other correctional facility," a suit brought by a third party *on behalf of* a prisoner may qualify as a suit "by" a prisoner within the meaning of the PLRA. If the rule were otherwise, parties asserting third-party standing for the prisoners would not be required to exhaust, even though prisoners asserting their own rights would be.

ing claims of federal employees who suffer adverse personnel action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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